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IN THE

Supreme Court of the United States

NO. 75-1819

MRS. LOUELLA CUTHBERTSON, ET AL,
Petitioners

VS.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CITATIONS

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners pray the Court for a writ of certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review a decision which that Court has rendered in

a case involving the parties above-named, and the Petitioners respectfully show to the Court:

THE OPINION OF THE COURT OF APPEALS AND THE ORDER OF THE DISTRICT COURT

The Opinion of the United States Court of Appeals for the Fourth Circuit has not yet been printed in the official reports, but is hereinafter set forth in the Appendix to this Petition.

The case came to the Court of Appeals upon appeal, by the Petitioners herein, from an Order of the United States District Court for the Western District of North Carolina. The Order of the District Court is likewise set forth in the Appendix to this Petition.

JURISDICTION

The Opinion of the Court of Appeals, embodying its decision and judgment, is dated March 18, 1976, and was entered on that date.

Jurisdiction to review, by writ of certiorari, the decision of the Court of Appeals is conferred on this Court by the provisions of 28 U. S. C. 1254(1).

QUESTION PRESENTED

The Plaintiffs,[1] both black and white, having alleged that each of the minor Plaintiffs, because of his

[1]Now Petitioners before this Court.

race and for no other reason whatever, is being barred by a governmental agency from attending a public school he wishes to attend and is qualified to attend, and is instead being forced by the governmental agency to attend a different school, solely because of his race—and that thereby the rights of the Plaintiffs under the Constitution of the United States are being violated—is it now the law that such allegations state no cause of action at all and that the Plaintiffs are to be dismissed from Court without trial or hearing?

CONSTITUTIONAL PROVISIONS INVOLVED

"No person . . . shall be . . . deprived of life, liberty, or property, without due process of law". Fifth Amendment to the Constitution of the United States.

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

After the filing of the Plaintiffs' Complaint in the District Court, that Court ruled, and the Court of Appeals later affirmed, that the allegations set forth in the "Question Presented" above do not state any cause of action and are to be dismissed without trial.

The District Court made its ruling of dismissal without hearing any oral argument from the Plaintiffs. Similarly, the Court of Appeals afforded the Plaintiffs no opportunity to present any oral argument.

More specifically, the brief sequence of proceedings in the case has been as follows. Upon the filing of the Plaintiffs' Complaint in the District Court, the Defendant filed an Answer and also a Motion to Dismiss, on the grounds that the Complaint failed "to state a claim upon which relief can be granted" (2, 30, 31[1]). Thereafter, the District Court issued a Memorandum, expressing the opinion that the Plaintiffs' suit should be dismissed for failure to state a cause of action (44).

At the same time, however, the District Court directed that the Clerk of Court should "hold this file in an inactive status until final action has been taken" in the case of *Swann vs. Mecklenburg Board of Education,* which was then still pending in that court (44[2]).

On July 30, 1975, in a one-sentence "Order of Dismissal", the District Court ruled that:—"The Motion

[1]Unless otherwise indicated, all page references are to the record in the case, as embodied in the Appendix filed by the Plaintiffs in the Court of Appeals and now on file in this Court.

[2]In the same Memorandum, the Court remarked that the present case "has been consolidated with *Swann vs. Board of Education*". That comment is, however, incorrect. This case was never consolidated with the *Swann* case.

of the Defendant to dismiss the Complaint is allowed, and this action is dismissed" (Appendix to this Petition, hereinafter page 4a).

From the District Court's ruling, the Plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit. As noted above, the Court of Appeals, without hearing argument, issued its Opinion, on March 18, 1976, affirming the District Court's Order of Dismissal (Appendix to this Petition, hereinafter page 1a).

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

I.

It Is An Established Principle That The United States Constitution Does Not Permit The States Or The Federal Government To Impose Restrictions Or Directives Upon Any Person Because Of His Race Or Color

It is first important, even though elementary, to note that upon a motion to dismiss for failure to state a cause of action, the allegations of a complaint are to be accepted as true.

> "For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted". *Jenkins vs. McKeithen,* 395 U. S. 411, 421, 23 L. Ed 2d 404, 416 (1969)

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief".

Scheuer vs. Rhodes, 416 U. S. 232, 236, 40 L. Ed 2d 90, 94 S. Ct. 1683 (1974), quoting *Conley vs. Gibson,* 355 U. S. 41, 45-46, 2 L. Ed 2d 80, 78 S. Ct. 99 (1957)

"It is elementary that a motion to dismiss will be denied unless it appears to a certainty that no possible set of facts could be proved to support plaintiff's claim".

Wolman vs. Tose, 467 F. 2d 29, 35 (4th Cir., 1972)

Thus, for purposes of this Petition, it is to be accepted from the allegations of the Complaint that:

Government, through the Defendant, a public agency—

Is barring the respective minor Plaintiffs, both black and white, from public schools they wish to attend, and is instead forcing them to attend other public schools they do not wish to attend—

For no reason whatever, other than the race and color of the respective Plaintiffs.

In the present posture of this case, it stands undenied that governmental restriction and compulsion is being "shaped and controlled and forcibly imposed" upon the respective Plaintiffs, because of their race and "solely according to their race and on no basis other than that of race" (4).

Yet it is now established as a matter of fundamental constitutional principle in this land that government shall place no restriction or requirement upon any citizen because of his race. To state this basic principle in other terms, it is now firmly settled that if any governmental authority takes note of a person's race and, by reason of what it ascertains to be his race, places any requirement upon him—for example, bars him from any place because of his race or compels him to go to any place because of his race—then his constitutional rights are thereby violated.

For decades now, particularly within the last twenty-five years, this Court, has woven this principle into the fabric of the law of this Nation. For example:

In the realm of public education, the landmark case of *Brown vs. Board of Education* ruled and proclaimed that from that time forward "admission to the public schools" of this country must be "on a non-racial basis". *Brown vs. Board of Education,* 347 U. S. 483, 98 L. Ed 873, 74 S. Ct. 686 (1954) and 349 U. S. 294, 301, 99 L. Ed 1083, 1106, 75 S. Ct. 753 (1955).

Regarding access to, and use of, public buildings, recreational facilities, parks, playgrounds, courthouses, and all other publicly owned and opperated facilities, it has been repeatedly held, in various contexts and applications, that no distinctions may be made on the basis of race. *Johnson vs. Virginia,* 373 U. S. 61 (1963); *Watson vs. Memphis,* 373 U. S. 526 (1963); *Dawson vs. Baltimore,* 220 F. 2d 386 (4th Cir., 1955), affirmed, 350 U. S. 877 (1955); *Lee vs. Washington,* 390 U. S. 333 (1968); *Burton vs. Wilmington Authority,* 365 U. S. 715 (1961); See also, 1964 Civil Rights Act, 42 U.S.C. §2000b(a).

" 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality'. *Hirabayashi vs. United States,* 1943, 320 U. S. 81, 100, 63 S. Ct. 1375, 1385, 87 L. Ed 1774, 1786. '[R]acial classifications are obviously irrelevant and invidious'. *Goss vs. Board of Education,* 1963, 373 U. S. 683, 83 S. Ct. 1405, 10 L. Ed 2d 632".

Bynum vs. Schiro, 219 F. Supp. 204 208 (1963), affirmed, 375 U. S. 395, 11 L. Ed 2d 412, 84 S. Ct. 452 (1964)

This is likewise the law as to establishments offering food and lodgings to the public. *Lombard vs.*

Louisiana, 373 U. S. 267 (1973); *Peterson vs. Greenville,* 373 U. S. 244 (1963); *Heart of Atlanta Motel vs. United States,* 379 U. S. 241 (1964); *Katzenbach vs. McClung,* 379 U. S. 294 (1964); See also, 1964 Civil Rights Act, 42 U. S. C. §2000a, et seq.

The same is true as to publicly owned or publicly assisted housing. *Reitman vs. Mulkey,* 387 U. S. 369 (1967); *Hunter vs. Erickson,* 393 U. S. 385 (1969).

The same principle has been firmly reiterated as to all common carriers and public transportation. *Browder vs. Gayle,* 142 F. Supp. 707 (M. D. Ala., 1956), affirmed, 352 U. S. 903 (1956); *Boynton vs. Virginia,* 364 U. S. 454 (1960); *Bailey vs. Patterson,* 369 U. S. 31 (1962).

As to all standards, procedures and arrangements affecting public elections, distinctions of race are clearly held to be constitutionally impermissible. *Guinn vs. United States,* 238 U. S. 347 1915); *Myers vs. Anderson,* 238 U. S. 368 (1915); *Nixon vs. Condon,* 286 U. S. 73 (1932); *Smith vs. Allwright,* 321 U. S. 649 (1944); *Terry vs. Adams,* 345 U. S. 461 (1953); *Louisiana vs. United States,* 380 U. S. 145 (1965); *Davis vs. Schnell,* 81 F. Supp. 872 (S. D. Ala., 1949), affirmed, 336 U. S. 933 (1949); *Gomillion vs. Lightfoot,* 364 U. S. 339 (1960).

Thus a State requirement that election ballots identify the race of candidates for public office is held to be a violation of the Fourteenth Amendment.

> "Race is the factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid. *Goss vs. Board of Education,* supra, 373 U. S. at page 688, 10 L. Ed 2d 636".
>
> *Anderson vs. Martin,* 375 U. S. 399, 404, 11 L. Ed 2d 430, 434, 84 S. Ct. 454 (1964)

Official separation of voting and tax assessment records according to race is likewise held to be unconstitutional under the Fourteenth Amendment.

> "Subsequent decisional law has made it axiomatic that no State can directly dictate or casually promote a distinction in the treatment of persons solely on the basis of their color".
>
> *Hamm vs. Virginia State Board,* 230 F. Supp. 156, 157 (1964), affirmed, 379 U. S. 19, 13 L. Ed 2d 91, 85 S. Ct. 157 (1964)

This Court has also held that it is unconstitutional for courts to enforce even private covenants which make racial distinctions.

> "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand".
>
> *Shelley vs. Kraemer,* 334 U. S. 1, 20, 92 L. Ed 1161, 1184, 68 S. Ct. 836 (1948)

Similarly, it is now established that with regard to marriage, government can enforce no prohibitions or restrictions on the basis of race.

> "We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race . . . Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State".
>
> *Loving vs. Virginia,* 388 U. S. 1, 11-12, 18 L. Ed 2d 1010, 1018, 87 S. Ct. 1817 (1967)

Such then is the law in our land today, firm and clear, that the United States Constitution does not permit government, either State or Federal, to impose restrictions or directives upon any person on the basis of his race or color.

II.

Governmental Restrictions And Directives On The Basis Of Race Are Being Imposed In The Public Schools, And Specifically In The Charlotte-Mecklenburg School System

In the midst of the strong, consistent and authoritative state of the law set forth above, there has arisen, within the last several years, an extraordinary paradox. This development has occurred particularly in one area, that of public education. In this area, various courts have ruled, and are ruling, that "admission to the public schools" of this country must proceed *on a racial basis rather than "on a non-racial basis"*.

Thus, public school authorities are being ordered by courts to observe the race and color of the children in their school systems and to sort them out racially, and then assign them and send them in various directions, according to their race and color, so as to accomplish a compulsory mixing of races in the various schools of the respective school systems. The school children are forcibly required to obey and conform to these racially determined assignments, no matter what may be the inconvenience and burden to them.

This is obviously and diametrically contrary to the central concept developed through the years in the numerous cases outlined above, namely, that government shall not impose restrictions or directives of any

sort upon its citizens on the basis of their race. Specifically, in the realm of public education, it is a 180 degree reversal of the principle laid down in the pivotal case of *Brown vs. Board of Education*.

Nor is the reversal merely a matter of illogic and of contradiction in concept and theory. Beyond that, it is a new and hard regime of governmental dictation on a broad and massive scale, to which both black and white citizens are being steadily subjected, solely by reason of their race and color.

Thus it is that in the present case, each of fifteen black school children states the extraordinary fact that "because he is black", and for no other reason, "the defendant excludes and bars him from the school which he wishes to attend near his home", and "solely because he is black, the defendant forcibly compels him, against his will, to attend a distant school which the defendant has, on account of his race, prescribed for him" (4-16). Each of sixteen other plaintiffs, who are white makes the same statement of fact, except as to the difference in racial identification (4-16).

The respective Plaintiffs state that the various distances from their homes to the schools they wish to attend and are qualified to attend, but which they are because of their race barred from attending, are as little as 180 yards round-trip, whereas the distances

from their homes to the schools they do not wish to attend, but which they are because of their race forced to attend, are as much as 34 miles round-trip.

All this compulsion is summarized in current terminology as "forced busing". Actually, the school children who are subjected to "forced busing" are not required to ride a bus. They are, however, required to get to the assigned schools in one way or another, and bus transportation is offered to them.

The defendant's explanation and defense, as to the directive which it has thus placed upon the plaintiffs, is that it is acting under "orders of the United States District Court for the Western District of North Carolina issued in *Swann, et al vs. Charlotte-Mecklenburg Board of Education, et al,* Civil Action No. 1974" (32-40). Thus, the defendant's position is that the plaintiffs do not have, and cannot have, a cause of action because the matters complained of came about "pursuant to orders" of the District Court.

It goes without saying, however, that the defendant school Board and the District Court alike are subservient to the United States Constitution. More specifically, Federal authorities, such as the United States Courts, and State authorities, such as the defendant, are, on the matters here at issue, controlled respectively by the provisions of the Fifth and Fourteenth Amendments to the Constitution. Thus, in *Bolling vs. Sharpe,* this Court, upon the Fifth Amend-

ment, reached the same conclusion as to racial compulsion imposed by Federal agencies that it reached in *Brown vs. Board of Education,* upon the Fourteenth Amendment, as to racial compulsion imposed by State agencies. *Bolling vs. Sharpe,* 347 U. S. 497 (1954); *Brown vs. Board of Education,* 347 U. S. 483 (1954).

The question therefore remains as to whether the plaintiffs' Complaint, in the light of the fundamental principle and the manifold authorities hereinabove cited, does or does not state a cause of action under the supreme law of the land, the Constitution of the United States.

III.

The Orders Of The District Court In The Swann Case Do Not Disqualify The Plaintiffs In This Case From Seeking Relief Against Racial Restrictions And Directives

As to the defense that there can be no cause of action with respect to the compulsions placed upon the plaintiffs, the District Court having broadly authorized and directed such compulsions in the *Swann* case, it is first and fundamentally to be observed that in the *Swann* case no person upon whom the compulsions would be imposed, was before the Court pleading his constitutional right in opposition to those compul-

sions—as each of the plaintiffs in the present case is now doing.

It is true that in the *Swann* case constitutional questions, or some aspects of constitutional questions, were discussed and considered. Any such discussion and consideration, in that case was, however, legally in the abstract. In *Swann*, the court was developing a "plan" or "program" for the assignment of children generally in the Charlotte-Mecklenburg public school system. No party in that case was raising and urging upon the court any plea or contention that his constitutional rights would be invaded and violated by the plan or program there under consideration.

The plaintiffs in the *Swann* case were insisting upon such a plan or program, and could certainly make no adversary presentation of the constitutional rights of persons who would be subjected, against their will, to the compulsions of the plan or program. As to persons, such as the plaintiffs in *Swann* who were seeking what the plaintiffs in the present case are opposing, this Court has said:

> "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals".
>
> *Shelley vs. Kraemer,* 334 U.S. 1, 22, 92 L. Ed 1161, 1185, 68 S. Ct. 836 (1948)

Nor could the Charlotte-Mecklenburg school board, defendant there as it is here, substitute or act as proxy for the individual citizens who possessed the constitutional rights which are now raised—and which no citizen was then in court to raise. The constitutional rights which the present plaintiffs now plead are theirs and are given and guaranteed to them personally and individually.

> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights".
>
> *Shelley vs. Kraemer,* 334 U. S. 1, 22, 92 L. Ed 1161, 1185, 68 S. Ct. 836 (1948)

This is very clearly expressed by this Court in *State of Missouri vs. Canada.* There the court emphasized that "the essence of constitutional right is that it is a personal one' ", and " 'it is the individual who is entitled to the equal protection of the laws' ". *State of Missouri vs. Canada,* 305 U. S. 337, 351, 83. L. Ed 208, 214, 59 S. Ct. 232 (1938).

Furthermore, as to the defendant's position that the plaintiffs can have no cause of action with respect to the compulsions they are being subjected to, since those compulsions are imposed "pursuant to" court directives in the *Swann* case, the following considerations are to be noted.

When the *Swann* case was before this Court, the Court said that "once the affirmative duty to desegregate" a public school system has been fulfilled, that school system "would then be 'unitary' in the sense required by our decisions in *Green* and *Alexander*' ", and that "neither school authorities nor District Courts" would then be required to take continuing action with regard to "the racial composition", of the schools in that system. *Swann vs. Charlotte-Mecklenburg Board of Education*. 402 U. S. 1, 31, 22, 28 L. Ed 2d 554, 91 Ct. 1267 (1971).

In *Green* and *Alexander* this Court had defined "a unitary school system" as one "within which no person is to be effectively excluded from any school because of race or color". *Alexander vs. Holmes County School Board*, 396 U. S. 19, 21, 24 L. Ed 2d 19, 21, 90 S. Ct. 29 (1969).

The District Court apparently now considers the Charlotte-Mecklenburg school system to be thus "unitary" for it has entered a "final order" in *Swann*, stating that its intendment is "to leave the constitutional operation of the schools to the Board", and directing "that the file be closed". *Swann vs. Charlotte-Mecklenburg Board of Education*, Civil Action No. 1974, in the United States District Court for the Western District of North Carolina, Final Order, dated July 11, 1975.

To similar effect see *Bradley vs. School Board of Richmond, Virginia*, 462 F. 2d 1058 (4th Cir., 1972),

affirmed, 412 U. S. 92 (1973); *Spencer vs. Kugler*, 326 F. Supp. 1235, affirmed, 404 U. S. 1027 (1972); *Milliken vs. Bradley*, 418 U. S. 717 (1974).

The orders in *Swann*, therefore, do not disqualify the plaintiffs from stating a cause of action against the compulsions directed in that case, because:—(1) No person raised in that case, as each of the plaintiffs now does, the plea that the directives there issued were in violation of his constitutional rights; and (2) The Charlotte-Mecklenburg school system appears to be judicially regarded as now "unitary" so that "neither school authorities nor District Courts" are "required" to take continuing action with respect to "the racial composition" of these schools.

Apart from these considerations, however, the primary and fundamental reasons, earlier projected in this Petition, as to why the plaintiffs are entitled to relief against the restrictions and compulsions which have been imposed upon them, will now be more fully set forth.

IV.

Constitutional Right May Not Be Denied, And Constitutional Wrong May Not Be Imposed, In The "Equitable Discretion Of A Court Or As A "Remedial" Or "Corrective" Measure

Under the many rulings of this Court, that governmental compulsion placed upon a person because of his race violates his constitutional right, it would certainly seem self-evident that when a plaintiff alleges

that he is being subjected to exactly such compulsion, he is stating a legal cause of action.

Moreover, each of the plaintiffs in the present case alleges specifically that the precise restriction and compulsion condemned in *Brown vs. Board of Education* is now being imposed upon him.

The exact adjudication in *Brown* was that it is a violation of a person's constitutional right to exclude him from any public school because of his race or color. *Green, Alexander* and *Swann,* supra. Each plaintiff in this case exactly so alleges, that is, that "solely because" of his race and color, the defendant governmental agency "excludes and bars him from the school he wishes to attend" (4-16).

Further, each plaintiff alleges that "solely because" of his race, the defendant governmental agency "forcibly compels him, against his will, to attend a distant school which the defendant has, on account of his race, prescribed for him" (4-16). This allegation is also a re-allegation that the plaintiff is, because of his race, being excluded from the school he desires to attend.

For if a plaintiff seeks to attend school A, but solely because of his race he is assigned to and compelled to attend school B, then obviously it is his race that is taking him away from, and preventing and excluding him from attending, school A.

Thus, not only by directly barring the plaintiff from entering school A, but also by compelling the plaintiff to go to school B—all because of, and solely because of, his race—the defendant doubly violates the specific and exact command of *Brown,* namely, that no person shall be excluded from a public school because of his race.

These allegations, it must be remembered, stand undenied upon the motion to dismiss. It must be accepted that what they declare to be occurring is indeed and in truth occurring. Yet such occurrences are in precise contravention of the very terms of *Brown.*

Nonetheless, it is ruled in the courts below that to allege such facts, such truth, and such state of affairs, contravening *Brown* and all the other holdings of this Court recited above, fails to state a cause of action—that to show and prove any such would be of no legal point or materiality whatsoever—and that the courts are therefore closed to all who seek to make such proof or showing.

To all of this, the only answer or explanation put forward is to the following effect: —That "at one time" in "the past", the defendant "maintained segregated schools"—and that in such situation it is appropriate and within the "equitable discretion" of courts, as a "corrective" and "remedial" measure to suspend or reverse the command of *Brown* that "admission to the public schools" must be "on a non-racial basis" and to

require and order instead, for an "interim period", the "assignment of students on a racial basis". *Swann vs. Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 22-29.

It is to be remembered that this concept was enunciated in litigation where no person was pleading his constitutional right against racial compulsion being imposed upon him by a governmental agency. Whether the absence of such plea, and such a pleader, was judicially deemed to justify the pronouncement of this concept in that case, does not appear.

In any event, the plaintiffs in the present case rest their complaint upon the simple and basic proposition that a public agency may not impose a purely racial restriction or compulsion upon a citizen who is pleading his individual and personal constitutional right against that being done to *him*—which, it must be emphasized, was not the case in *Swann.*

It is submitted that once a constitutional right is adjudged and established, courts have no power and no "discretion" to suspend it or to deny it to any person who pleads for its protection. Whatever is constitutionally guaranteed cannot be declared "out of effect" for a season. When it has been definitively proclaimed, as was certainly done in *Brown,* that any person has a constitutional right not to be excluded because of his race from any public school, then no governmental

authority, as against a person claiming that constitutional right, can lawfully proceed to exclude him from a public school because of his race—neither for "remedial" or "corrective" purpose, nor for an "interim" or any other period of time.

If nevertheless this is done and if he thereupon goes to court alleging that he has a specific constitutional right not to be excluded by governmental authority from a public school because of his race, but that in truth and in fact he *is* being excluded by governmental authority from a public school because of his race—then surely it cannot be validly ruled that his allegations are a mere nullity, stating nothing of any legal significance whatever.

Were it otherwise, and if constitutional rights could be enforced or suspended, declared in effect or out of effect, as courts or chancellors, magistrates or administrators might deem wise or desirable, then the Constitution of the United States would indeed have ceased to be supreme law, and a mighty rock would have become but shifting sand.

> "The Constiution was intended—its very purpose was—to prevent experimentation with the fundamental rights of the individual".
>
> *Truax vs. Corrigan,* 257 U. S. 312, 338, 42 S. Ct. 124, 66 L. Ed 254, 265 (1921)

It is a truly confused—a self-contradictory state of affairs—that since black persons, because of their race, were once excluded from public schools which they wished to attend in the Charlotte-Mecklenburg school system, therefore the "remedy" and "corrective" for that is now to exclude them again, because of their race, from public schools which they wish to attend in the Charlotte-Mecklenburg school system. In short, the prescription and cure for the constitutional wrong of governmental restriction and compulsion based on race is decreed to be more of the same wrong, namely, governmental restriction and compulsion based on race.

It is strange indeed that, for example, it is now said to a black child:—"Twenty-five years ago, in this same school system, your Father was barred from the school he wished to attend because he was black. Although that was later adjudged to be a violation of his constitutional right, you also will now be barred from the school you wish to attend, and for the same reason, namely, that you are black".

> "The freedom of the Negro child to attend any public school without regard to his race or color, first secured in the Brown cases, is again lost to him after a short life of less than thirteen years".
>
> *United States vs. Jefferson County Board of Education*, 380 F. 2d 385, 419 (5th Cir., 1967—concurring opinion)

> "[W]hile professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike".
>
> *United States vs. Jefferson County Board of Education*, 380 F. 2d 385, 405 (5th Cir., 1967—dissenting opinion)

The irony of the situation starkly appears when it is realized that the plaintiffs, black and white, are in court today pleading for the same thing that the plaintiffs in *Brown* went to court for twenty-two years ago.

The briefs filed in the Supreme Court by the plaintiffs in the *Brown* case, and the cases companion to it, presented the very contentions that the plaintiffs are now making in the present case. For example[1]:

> "The State of Kansas in affording opportunities for elementary education to its citizens, has no power under the Constitution of the United States to impose racial restrictions and distinctions".
>
> Brief for the plaintiffs in the Kansas case.

"This court . . . should decree that respondents, lacking the constitutional power to assign pupils to

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[1]Synopses of the various briefs for the plaintiffs in the Brown case are set forth in 99 L. Ed at pages 1085-1104.

public schools on the basis of race, immediately cease and desist using race as a factor in making such assignments".

Brief for the plaintiffs in the District of Columbia case.

"Segregation or classification of respondents on the basis of color by the state for determining schools they shall attend violates the equal protection clause of the Fourteenth Amendment".

Brief for the plaintiffs in the Delaware case.

"Normal exercise of the judicial function calls for a declaration that the state is without power to enforce distinction based upon race or color in affording educational opportunities in the public schools. The Fourteenth Amendment prohibits a state from making racial distinction in the exercise of governmental power.

* * *

"The Fourteenth Amendment requires that a decree be entered directing that appellants be admitted forthwith to public schools without distinction as to race or color".

Brief for the plaintiffs in the Virginia case.

The decree which the plaintiffs in the *Brown* case requested of the court was that the school authorities be ordered "to cease using race as a basis for determining admission, assignment or attendance in public schools . . ." (Decree tendered by plaintiffs in the Supreme Court of the United States in the *Brown* case).

This Court granted that request. The plaintiffs now make the same request. Surely it would not have been granted then and be denied now.

"Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all . . .

"Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand".

Hill vs. Texas, 316 U. S. 400, 406, 86 L. Ed 1559, 1563, 62 S. Ct. 1159 (1942)

Despite the undeniable fact that the plaintiffs in *Brown* sought and obtained from this Court the landmark pronouncement that government may not, in matters of assignment to public schools, place restriction or compulsion upon any person because of his race, yet now the Opinion of the Court of Appeals,

in the present case, tells the plaintiffs that they have no valid complaint, for that, the defendant's "present use of race in assigning some students is constitutional" (Appendix to this Petition, hereinafter page 3a).

Immediate confirmation of the inherent fallacy of this ruling is to be seen not only in the admission of the defendant's "present use of race", but also in the phrase "assigning some students". How can the "use of race in assigning some students"—but not others—be constitutionally justified? Does the Constitution of the United States protect only some of its citizens from racial restriction and compulsion? Since the protection is a constitutional one, how do school administrators or judges or any other authority have the power to decide who shall retain the protection and who shall be divested of it—and for how long?

It is respectfully submitted that in such rulings, the character of our Constitution is gradually but tragically transformed—becoming not so much that of a great beacon light as that of a revolving weather vane.

There are still further aspects of the constitutional rights here at issue, which should be given close attention and consideration.

What is assured to the individual in the Fifth and Fourteenth Amendments is protection against gov-

ernmental power and action in the respects set forth in those Amendments. It is thus self-evident that when it is shown that a person is under a governmental compulsion which transgresses the protection of these Amendments, then what he is entitled to is removal of the offending compulsion.

These constitutional provisions are, therefore, shields to the individual. They do not provide in any event for the placing of any sort of requirement upon him. They provide only for the removal of governmental requirements from him. Where they are applicable, their entire nature and purpose is to free the citizen from a restriction or compulsion, not to impose upon him any restriction or compulsion whatsoever.

Wholly consistent with this, *Brown* removed a restriction and compulsion theretofore existing. Wholly inconsistent with the nature of these constitutional rights, the orders now in question impose restriction and compulsion.

Prior to *Brown*, there were in various states governmental prohibitions against citizens of different races attending a public school together. The issue in *Brown* was whether an individual had a constitutional right to have this restriction removed from him, so that there would be no prohibition against his attending a school with persons of a different

race. *Brown* held that the individual does have a constitutional right against such prohibition and is entitled to have it removed from him.

There was no claim in *Brown,* and no decision in *Brown,* that any person had a constitutional right to call on any governmental authority to force any person, because of his race, to stay out of any public school he wished to attend or go into any public school he did not wish to attend. The plea and the decree in *Brown* were exactly the opposite. The law laid down in *Brown* does not require that such governmental force be imposed upon any person. Precisely to the contrary, it forbids the imposing of such governmental force upon any person.

The difference is total and crucial. Yet it seems to elude many minds. It is the monumental difference between the removal of governmental force from the citizen and the imposition of governmental force upon the citizen. It is the difference between increasing individual freedom and diminishing individual freedom.

Brown vs. Board of Education, and the many other cases hereinabove cited, interpreted the Constitution as granting and assuring *liberty* to citizens of different races to come together, in public schools and otherwise, if they so choose—free of any contrary governmental restriction because of race. More recently,

however, there have been decisions, as in *Swann,* the trend of which is to interpret the Constitution as authorizing, and perhaps requiring, the *withdrawal* of such *liberty* and the *governmental forcing* of citizens together, because of their being of different races, and regardless of what may be their wish or choice in the matter.

For government *to force its citizens apart,* because of race, or *to force its citizens together,* because of race, is equally wrong. The one is no less dictatorial and oppressive than the other. It is submitted that the United States Constitution requires neither — and permits neither. The mandate of the Fifth and Fourteenth Amendments is that the individual shall be free from racially imposed governmental force in either direction.

> "It is unthinkable that our Constitution does not contemplate a middle ground—no compulsion one way or the other".
>
> *United States vs. Jefferson County Board of Education,* 380 F. 2d 385 414 (5th Cir., 1967—dissenting opinion)

In the decades of the 1950's and 1960's, the tenor and thrust of this Court's decisions involving racial questions was that the Constitution required that gov-

ernmental actions be color blind. More recently, various Federal Court decisions, particularly in the realm of public schools, view the Constitution as requiring that governmental actions be preeminently and above all color conscious.

The essential nature of the former decisions was *to free* the individual from governmental force imposed because of race. The essential nature of the latter decision is *to impose* governmental force upon the individual because of race. The imperative need is to regain the high ground and the sound principle of the former decisions.

> "The true answer remains, give [the school pupil] absolute freedom of choice and see to it that he gets that choice in absolute good faith".
>
> *United States vs. Jefferson County Board of Education,* 380 F. 2d 385, 420 (5th Cir., 1967—concurring opinion)

"Absolute good faith" in protecting the individual from racial restriction or compulsion at the hands of any and all governmental authority is indeed essential. All of the zeal and interest and concern that surrounds this matter should be brought to bear to see to it that this freedom is truly and genuinely accorded to every school child—and that there is no governmental action or practice or subterfuge to the contrary.

There must be impartial and vigorous enforcement of this freedom from every side and in every quarter. All governmental action which restricts individual freedom on grounds of race should cease, whether the thrust of such governmental action is in the direction of forcing racial separation or in the direction of forcing racial mixing. Governmental requirement, based upon racial considerations, is the evil and the wrong in either case, and it is this that the Constitution forbids.

In the background of governmental directive, shaped according to race, there is a no-doubt genuine belief that it is best for those on whom it is imposed —best for all public school children and for their communities and for the Nation as a whole—and that it will be of benefit psychologically and culturally, lift educational achievement, improve race relations and contribute to general sociological advancement.

Those subjects are, of course, outside the realm of this argument, but it might be remarked in passing that it seems reasonable to question whether forcing children on purely racial grounds into schools—particularly distant schools which they do not wish to attend and which they attend only at great inconvenience—is likely to increase their motivation to apply themselves in such schools, or likely to have good effect upon their relations with their fellow students

there, or likely in any way to improve morale, discipline or standards of excellence in those schools.

Indeed, numerous sociological and educational studies increasingly indicate that experience is proving such common sense doubts to be not only reasonable but correct. Virtually none seem to reach any opposite conclusions[1].

Sociological pros and cons are, however, essentially aside from the point, upon issues of constitutional right. Whatever may be deemed sociologically desirable or undesirable, or progressive or regressive, it cannot override the rights of the individual person, as guaranteed to him by the Constitution. A person's constitutional rights do not depend upon anybody's opinion as to what is best for him, nor upon the judgment of any authority as to what will be beneficial to him or to others.

As expressed in *Truax vs. Corrigan,* supra, "the very purpose" of a written Constitution was to place the rights which it guarantees to the individual citizen, beyond the reach of all who may believe that they have better "plans" and "programs" for him.

It is important to remember the admonition of Justice Brandeis in *Olmstead vs. United States*:

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[1]See, for example, "Busing as a Judicial Remedy: A Socio-Legal Reappraisal", Indiana Law Review, Volume 6, Number 4, 1973, in which a wide spectrum of research on this subject is reviewed and analyzed.

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent".

Olmstead vs. United States,
277 U. S. 438, 479, 72 L. Ed 944,
957, 48 S. Ct. 564 (1928—
dissenting opinion)

In summary—it is obvious that the present-day regime of racial restriction and compulsion in the public schools is permeated with glaring inconsistencies of principle and profound constitutional error. These are the sources of the continuing perplexity and confusion, and of the unending controversy, on this subject.

The true solution is to be found in freedom to the individual — freedom without regard to his race — freedom from any and all governmental restriction or compulsion based on race.

CONCLUSION

Upon all of the foregoing, the plaintiffs respectfully urge that the Court grant their Petition for a Writ of Certiorari, to the end that this Court may review the action of the Courts below in summarily dismissing the plaintiffs' Complaint in this case.

WHITEFORD S. BLAKENEY
Attorney for the Petitioners

APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 75-2128

Mrs. Louella Cuthbertson, for herself and for her minor children, Shirley Jean Cuthbertson, Roger Darin Cuthbertson and Cathy Lyn Cuthbertson; Luther J. Reynolds, for himself and for his minor children, Barbara S. Reynolds, Elgin G. Reynolds, and John E. Reynolds; Mrs. Virginia Jackson, for herself and for her minor children, Robert Jackson, Charles T. Jackson, Brenda Jackson, Robert Anderson and Gerald Anderson; Mrs. Charles R. Helms, for herself and for her minor children, Stewart La Don Helms and Charles Derrick Helms; Donald Ray Jones, for himself and for his minor child, Larry Vance Jones; Mrs. David Moore, for herself and for her minor child Bruce Edward Moore; Mrs. Mary Jo Helms, for herself and for her minor child Earl Ray Helms, Jr.; Elliott Sanders, for himself and for his minor child, Jerry Michael Sanders; Mrs. Joe C. Helms, for herself and for her minor child, Dwight D. Helms; Ben Thompson, for himself and for his minor children, Dianne Thompson, Ben Franklin Thompson, and Gloria Jean

Thompson; Mrs. Sally I. Lewis, for herself and for her minor children, Deborah V. Lewis and Karen L. Lewis; Robert B. Watson, Sr., for himself and for his minor child, Jeanne Elizabeth Watson; Ben C. Crawford, for himself and for his minor child, Christina Crawford; Douglas L. Shivar, for himself and for his minor child, Shelly Shivar; Joseph Touch, for himself and for his minor children, March Wayne Touch and Trent Alan Touch; Mrs. Lois C. Reeder for herself and for her minor child, Christie Anderson Roberson,

Appellant,

v.

Charlotte-Mecklenburg Board of Education,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Submitted March 2, 1976. Decided Mar. 18, 1976

Before BUTZNER, RUSSELL and FIELD, Circuit Judges.

(Whiteford S. Blakeney, Attorney for Appellants; William W. Sturges, Attorney for Appellee.)

PER CURIAM:

Appellants challenge the constitutionality of the method by which the Charlotte-Mecklenburg Board of Education assigns students to schools, on the ground that assignments are made on the basis of race in violation of the equal protection clause. The district court dismissed the complaint for failure to state a claim upon which relief could be granted.

The Supreme Court has held that where a school system has violated the equal protection clause by maintaining segregated schools in the past, the race of students may be considered in formulating a remedy for that violation. North Carolina State Board of Education v. Swann, 402 U.S. 43, 46 (1971). The Court has also accepted a district court's finding that the Charlotte-Mecklenburg Board of Education maintained segregated schools at one time. *See* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). Under these decisions the Board's present use of race in assigning some students is constitutional.

Accordingly, we dispense with oral argument and affirm the judgment of the district court.

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division

C-C-73-79

MRS. LOUELLA CUTHBERTSON, ET AL.,
Plaintiffs,
-vs-
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Defendant.

ORDER OF DISMISSAL

The motion of the defendant to dismiss the complaint is allowed, and this action is dismissed.

This 30 day of July, 1975.

James B. McMillan
United States District Judge